

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Establishment of a Class A
Television Service)

MM Docket No. 00-10
MM Docket No. 99-292
RM-9260

RECEIVED

FEB/10 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF COMMUNITY SERVICE TELEVISION COMPANY

Community Service Television Company ("CST"), by its attorneys, hereby submits comments in response to the Notice of Proposed Rulemaking ("NPRM") released by the Commission on January 13, 2000 in the above-referenced proceedings.^{1/} In support thereof, the following is respectfully shown:

In the Community Broadcasters Protection Act of 1999 (the "CBPA")^{2/} Congress established procedures and qualifications whereby low power television ("LPTV") stations may become eligible for Class A licenses that afford them primary status as television broadcasters. In particular, Section (f)(2)(A) of the CBPA provides that LPTV stations will qualify for Class A status if, during the 90 days preceding the November 29, 1999 date of enactment of the CBPA, they (i) broadcast a minimum of 18 hours per day and (ii) broadcast an average of at least three hours per week of programming produced within the market area served by the station.

^{1/} *In the Matter of Establishment of a Class A Television Service, Order and Notice of Proposed Rulemaking in MM Docket Nos. 00-10 and 99-292* (FCC 00-16, rel. Jan. 13, 2000).

^{2/} Community Broadcasters Protection Act of 1999, Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), Appendix I, *codified at* 47 U.S.C. § 336(f).

Notwithstanding such qualifications (or the absence thereof), Section (f)(2)(B) of the CBPA provides that a station will be considered as qualifying for Class A licensing if “the Commission determines that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission.” Thus, the CBPA accords the Commission broad discretion to consider public interest factors and other reasons, apart from the base criteria specified in Section (f)(2)(A), that may justify a designation of Class A status. Recognizing its responsibility under the CBPA to consider such alternative eligibility criteria, the Commission has invited “comment on the circumstances that might warrant a determination that a station that does not meet the eligibility criteria set forth in section (f)(2)(A) of the statute nonetheless should be considered qualified for Class A status.” NPRM, ¶21.

I. The Commission Should Grant A Class A Television License To CST In Light Of Extraordinary Circumstances Wholly Beyond CST’s Control That Have Denied CST The Opportunity To Demonstrate Its Class A Eligibility.

CST believes that it is consistent with Congress’ intent as expressed in Section (f)(2)(B) of the CBPA, and with the public interest, convenience and necessity, for the Commission to grant Class A status to an LPTV station where, despite best efforts, it has been impossible to meet the specific broadcast and programming criteria of Section (f)(2)(A) of the CBPA during the 90-day period preceding its enactment. As shown below, notwithstanding ongoing diligent efforts to initiate operations spanning several years, a truly extraordinary chain of circumstances beyond its control has prevented CST from commencing operation of its LPTV station. As a result, and through no fault of its own, CST has been denied the opportunity to establish its eligibility under the CBPA’s basic programming standards within the prescribed 90-day period preceding the statute’s enactment.

CST is the permittee of LPTV station K31FC, San Diego, California (BPTTL-810318JJ). As indicated by its file number, CST's construction permit application for the San Diego LPTV station was filed in 1981. CST, a minority-controlled company, became the tentative selectee for this station by lottery conducted on October 5, 1984. *Public Notice*, Rep. TS-11. Although CST remained ready, willing and able to launch an innovative programming service aimed at the sizeable Mexican American community of San Diego, the award of the K31FC construction permit to CST was held up for the next *13 years* while the Commission and CST awaited the consent of the Mexican government for the allotment of Channel 31 at San Diego.

During this 13-year Mexican "hold" on CST's LPTV application, other developments created additional problems. First, the proposed transmitter site changed from being the tallest building in downtown San Diego, to a building surrounded on all four sides by much taller buildings. While this nearby building construction took place, rendering the applied-for site unusable, CST was powerless to propose a different site because CST's application remained in tentatively selected status -- not granted -- during the 13 year hiatus and, thus, could not be amended to propose a useable site.^{3/}

In addition, the Commission during this period developed its DTV Table of Allotments, 47 C.F.R. § 73.622 (1999), which included the allocation of Channel 31 to full-service television Station KTLA(TV), Los Angeles, thus precluding the operation of Station K31FC at its authorized site. Accordingly, CST was required to file a displacement application on June 1, 1998 specifying NTSC Channel 20 as its proposed channel (BMPTTL-980601TX).

^{3/} Such an amendment would have been "major." Major amendments render an application newly filed. In this circumstance, because CST's application remained in a consolidated state with "lottery-losing" applications, the major amendment would have required the dismissal of the application.

Unfortunately, one other applicant filed for Channel 20. Again, CST's efforts to bring a Spanish-language station to this market were blocked. Having no better alternative, CST entered into a settlement agreement with the other mutually-exclusive applicant under which CST was to dismiss its application for Channel 20 and to find another channel on which to operate Station K31FC.

Following this most recent frustration of CST's plans, CST engaged a consulting radio engineer to determine whether the LPTV station could remain on Channel 31 and protect the Los Angeles Channel 31 DTV allocation. CST's engineer was able to develop a technical proposal for the station to stay on Channel 31, albeit with less coverage, if yet another new site were selected. To implement this solution, CST filed an amendment to its pending displacement application. BMPTTL-19990903AAS. Currently, this application remains pending as the Commission seeks consent (once again) from the Mexican government for the new transmitter location.

As stated above, CST intends to provide valuable programming services to the large Hispanic population of the San Diego metropolitan area, services which currently are not provided by another existing local television station, and would be produced within the local Hispanic community rather than merely re-broadcasting a national feed. The population of the projected service area for Station K31FC is more than 62% Hispanic and primarily Mexican American.^{4/}

^{4/} CST's plans to originate such programming is not, and has never been, designed to promote CST's request for Class A status. That the origination of service to the Hispanic community is a key component of CST's business plan, and not a genuflect to the Commission, is shown by the fact that CST reiterated this commitment in June of 1997, before the Community Broadcasters Association's September 30, 1997 petition for rule making to create a Class A service and before the enactment of the CBPA in (footnote continued)

Moreover, CST is uniquely qualified to serve this growing community, as CST's majority owner, Frank Dominguez, is a prominent Mexican-American who is looked to as a leader in both the local and national Mexican-American communities, and who has long sought to provide program services addressing the unique needs, tastes, desires and concerns of this important community. Mr. Dominguez has developed and operated CATV systems in primarily Hispanic communities in California, and has been involved in numerous Hispanic movie productions. Clearly, Mr. Dominguez and CST embody the goals of diversity and equal opportunity cited by the Commission as a key aspect of the "public interest" requirement. In fact, they well reflect the intent of Congress as expressed in its findings supporting the CBPA that "[i]t is in the public interest to promote diversity in television programming such as that currently provided by low power television to foreign-language communities."^{5/} Considering the fact that, but for the Mexican government's delay, CST would have been providing valuable programming to the Hispanic community for the past 15 years, the Commission should find that the "public interest, convenience and necessity" would be served by the grant of eligibility for Station K31FC to operate as a Class A television station.

1999. *Conditional Request of CST for Waiver of LPTV Processing Rules*, at note 1 (File Nos. BPTTL-810318JJ & -960517YF) (filed June 6, 1997).

^{5/} Conference Report to Accompany H.R. 3194, Report 106-479, p. 1166. *See also*, 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to section 202 of the Telecommunications Act of 1996, *Notice of Inquiry*, MM Dkt. 98-35 (rel. Mar. 13, 1998). Chairman Kennard stated that the Commission "must stay focused on the two key aspects of the public interest; promoting competition and promoting diversity." Commissioner Tristani stated that the Commission's "interest in promoting a diversity of voices and viewpoints can be satisfied only through a large number of separately-owned competitors in the market." *Id.* *See also* Establishment of a Class A Television Service, *Notice of Proposed Rulemaking*, Joint statement of Chairman William E. Kennard and Commissioner Gloria Tristani, MM Dkt. 99-292 (rel. Sept. 29, 1999) ("LPTV stations commonly serve as exclusive outlets for foreign language and special programming for unserved and (footnote continued)

CST stands ready to construct its station at the new site, as evidenced by its Request for Special Temporary Authority, filed with the Commission on December 22, 1999, and by its Statement of Eligibility filed on January 28, 2000.^{6/} CST's good faith efforts to initiate minority owned and oriented television programming in San Diego, beginning in 1981 with the filing of its application for LPTV Station K31FC, have been continually delayed and frustrated by a series of unique circumstances beyond its control. But for these circumstances, CST would have been easily able to meet the Class A eligibility criteria during the 90-day period preceding the enactment of the CBPA. Clearly, these unique and unavoidable circumstances ought not stand as a permanent, insurmountable bar to CST's Class A qualifications.^{7/}

As noted, Section (f)(2)(B) of the CBPA gives the Commission broad discretion to consider public interest factors or other reasons, apart from the base criteria specified in Section (f)(2)(A), that may justify a designation of Class A status. Section (f)(2)(B) requires that the Commission give appropriate consideration to unique circumstances, such as those presented here, where it is clear that events beyond the licensee's control have prevented it from meeting Section (f)(2)(A)'s operating criteria. Both the public interest and elemental fairness will be served by granting a Class A license to LPTV Station K31FC, San Diego, California.

underserved audiences. Moreover, many LPTV stations are owned by small businesses, minorities and women and thus enhance the diversity of ownership in the broadcast industry.”).

^{6/} See, Public Notice, Statements of Eligibility For Class A Low Power Television Stations Status Tendered For Filing, Mimeo No. 97659, released February 8, 2000, p. 9.

^{7/} It is noted in this regard that the Commission has requested comment on whether it should, as a matter of policy, allow LPTV stations to apply to convert to Class A status after the application period provided for in the Act. NPRM, ¶9.

II. The Commission Should Fully Protect Class A Facilities From New NTSC And DTV Allocations.

With certain limited exceptions, the Commission has proposed protecting certain Class A LPTV signal contours against predicted interference from NTSC, DTV, LPTV and TV translator stations authorized after the enactment date of the CBPA. NPRM, ¶13. With respect to NTSC TV protection, the Commission proposes that pending applications for new NTSC full power stations would not be protected, nor would allotment proposals for such facilities, modified allotment proposals for channel or other technical changes, or the facilities in modification applications filed after November 29, 1999, the effective date of the CBPA. NPRM, ¶27. As to DTV, the Commission interprets the CBPA to mean that new DTV entrants must preserve the service areas of LPTV stations that have been granted a certification of eligibility, and that LPTV Class A applicants that have filed certificates of eligibility will not be required to protect the DTV application and allotment proposals of new DTV entrants. NPRM, ¶31.

CST supports these approaches. Protection against subsequent NTSC and DTV proposals is inherent to the CBPA's concept of protected Class A status for qualifying LPTV stations. Without such clear and explicit protections, the post-CBPA regulatory environment for

LPTV would be little different from its traditional secondary status, a result clearly contrary to the intent of the CBPA.

Respectfully submitted,

**COMMUNITY SERVICE TELEVISION
COMPANY**

By: 
Thomas J. Dougherty

By: 
Francis E. Fletcher, Jr.

Gardner, Carton & Douglas
1301 K Street, NW, Suite 900 East Tower
Washington, D.C., 20005
(202) 408-7100

February 10, 2000

Its Attorneys